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No. 88-686

In The

Supreme Court of the United States

October Term, 1988

GRACIANO D'ANDREA,

Plaintiff and Petitioner,

vs.

BANK OF AMERICA N.T. & S.A.,

Defendant and Respondent.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*[1] is the exclusive remedy for an employee who alleges that he was terminated solely to deprive him of retirement and pension benefits.[2]

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[1] ERISA is a comprehensive federal statute which regulates pensions and other employee benefit plans. Section 2(a) of ERISA, 29 U.S.C. § 1001(a). ERISA protects the interests of participants in employee benefit plans, *inter alia,* providing for appropriate remedies, sanctions and ready access to the federal courts. Section 2(b) of ERISA, 29 U.S.C. § 1001(b).

[2] Petitioner misstates the issue in the case. The issue is not, as Petitioner contends, "when the allegations of an action for damages for wrongful termination of employment would entitle the Plaintiff to recover under several theories recognized by state law, does the fact that they would also entitle him to equitable relief in an action under ERISA preempt the action to federal jurisdiction?" (Petitioner's Opposition, p. i.) Rather, the issue stated by the California Court of Appeal is whether "[A] complaint that a discharge occurred for the sole purpose of depriving an employee of job related benefits . . . falls under exclusive federal court jurisdiction." (Court of Appeal Opinion, pp. 11-12).

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JURISDICTION

On May 12, 1988, the California Court of Appeal for the Second Appellate District, Division Six, rendered its decision affirming summary judgment on behalf of Defendant and Respondent Bank of America National Trust and Savings Association ("the Bank"). On July 27, 1988, the California Supreme Court denied Plaintiff and Petitioner Graciano D'Andrea's ("Petitioner") Petition for Review. Jurisdiction appears to be invoked by 28 U.S.C. § 1257(3) which provides, *inter alia*, that:

> Final judgments or decisions rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

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STATEMENT OF THE CASE

This case involves a claim by Petitioner in his Fifth Amended Complaint that he was wrongfully discharged by the Bank for the *sole purpose of denying him his retirement and pension benefits.* Based upon the settled principle that state law tort actions alleging terminations aimed solely at depriving an employee of pension benefits are preempted by ERISA, the Bank filed a Motion for Summary Judgment. The Court of Appeal affirmed the judgment. The California Supreme Court thereafter granted Petitioner's first petition for review. Subsequently, the California Supreme Court transferred the matter

back to the Court of Appeal with directions to refile the opinion with appropriate citations to *Pilot Life Insurance Co. v. Dedeaux*, 487 U.S. 41 (1987), and *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987). The Court of Appeal reaffirmed its earlier ruling, and upheld the lower court's grant of summary judgment. Petitioner again filed for review in the California Supreme Court. The Supreme Court denied Petitioner's petition for review. On or about October 24, 1988, Petitioner filed a Petition for Certiorari with this Court.

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SUMMARY OF ARGUMENT

The California courts properly ruled that, based on the preemption provisions of ERISA, they lacked jurisdiction over Petitioner's wrongful discharge and fraud claim.[3] All courts that have addressed this issue have held that terminations aimed at depriving employees of pension benefits are within the exclusive jurisdiction of the federal courts. Contrary to Petitioner's assertions, the deprivation of pension benefits is the essence of his claim, not merely an element of his damages.

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[3] Petitioner's fraud claim is based on the same operative facts as his claim for wrongful discharge. Petitioner claimed that Respondent terminated his employment for the purpose of defrauding him of retirement benefits. As the Court of Appeal noted, "Both causes of action were based *entirely* on Respondent's alleged wrongful denial of [Petitioner's] retirement benefits." (Court of Appeal Opinion, p. 3.)

ARGUMENT

Section 510 of ERISA (29 U.S.C. § 1140) expressly provides that it is unlawful to *discharge* or discriminate against a participant of an employee benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . ." ERISA provides a remedy for violations of this section in Section 502(e) (29 U.S.C. § 1132(e)). Section 502(e) provides that,

> (1) . . . The district courts of the United States shall have *exclusive jurisdiction* of civil actions under this title brought by the Secretary or by a participant, beneficiary or fiduciary. (Emphasis added.)[4]

Courts have uniformly held that actions alleging conduct proscribed by Section 510 of ERISA are preempted

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[4] Under ERISA state courts have concurrent jurisdiction with the federal district courts only in those cases where a civil action is brought by a participant or beneficiary of an employee benefit plan "to recover benefits due to him under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan." Section 502(a)(1)(B) of ERISA. (29 U.S.C. §§ 1132 (a)(1)(B).) Allegations of terminations aimed at depriving the employee of benefits, such as Petitioner's in the instant case, are within the exclusive jurisdiction of the federal courts because they are based on alleged violations of a *provision* of ERISA itself, (Section 510), rather than violations of the *terms* of a particular benefit plan. *Kross v. Western Elec. Co., Inc.*, 701 F.2d 1238, 1244 (7th Cir. 1983).

In this case, Petitioner concedes that he is not suing to recover benefits due to him under the terms of a plan covered by ERISA, or to clarify his rights to future benefits under the terms of the plan. "[A]ppellant admits that his suit does not seek pension payments or an increase in such payments, nor that it alleges illegality in the terms and conditions of respondent's pension plan or that appellant became entitled to a particular pension plan." (Court of Appeal Opinion, p. 14.)

by the Act, irrespective of the theory advanced. *See, Johnson v. Trans World Airlines, Inc.*, 149 Cal.App.3d 518 (1983); *Sorosky v. Burroughs, supra; Witkowski v. St. Anne's Hospital of Chicago, Inc.*, 447 N.E. 2d 1016 (1983) (Employee's complaint alleging wrongful discharge from employment solely to prevent her from participating in a long-term disability plan preempted by ERISA); *Gordon v. Matthew Bender & Co., Inc.*, 562 F.Supp. 1286 (N.D.Ill. 1983) (Complaint charging that plaintiff was fired ten months prior to becoming fully vested in employer's pension plan preempted by ERISA); *Kelly v. International Business Machines Corp.*, 573 F.Supp. 366 (E.D. Pa. 1983), *affd.*, 746 F.2d 1467 (3rd Cir. 1984) (Pennsylvania employee's pendent state claim for wrongful discharge in order to prevent her from receiving disability benefits preempted by ERISA); *Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare and Pension Funds*, 559 F.Supp. 158 (N.D. Ill. 1982) (Illinois employee's state "retaliatory discharge" claim based on his age and his cooperation with Department of Labor in an ERISA-related matter preempted by ERISA); *See also, Pilot Life Insurance Company v. Dedeaux, supra; Dependahl v. Falstaff Brewing Corp.*, 633 F.2d 1208 (8th 1981), *cert. denied*, 454 U.S. 968 (1981); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.3d 1348 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985); *Provience v. Valley Clerks Trust Fund*, 163 Cal.App.3d 249 (1984); *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985).

Petitioner contends that his common law tort causes of action for wrongful discharge and fraud are not pre-

empted by ERISA because they state claims that are "independent of the benefit plan." (Petition for Writ of Certiorari, pp. 5-8.) Petitioner asserts that his claim for pension and retirement benefits is but a theory of recovery. Petitioner mischaracterizes the gravamen of his complaint. "Alleging that he was dismissed by respondent for trumped-up charges of a conflict of interest, appellant expressly complained that the false accusations were made in bad faith for the sole purpose of depriving him of his promised pension." (Court of Appeal Opinion, p. 4.)

The California court concluded that Petitioner's wrongful discharge and fraud claim were based solely on the theory that he was terminated to deprive him of pension and retirement benefits. (Court of Appeal Opinion, pp. 3, 4, 14, 17.) The court correctly concluded that, "It is settled that state tort claims of wrongful discharge and fraud, which refer to alleged denials of employment benefit plans, are preempted by ERISA, even if ERISA is not mentioned. (*Johnson v. Trans World Airlines, Inc.*, 149 Cal.App.3d 518, 524 (1983); *Sorosky v. Burroughs Corp., supra,* 826 F.2d 800.)" (Court of Appeal Opinion, p. 6.)

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CONCLUSION

There is no conflict among the courts, and this is not a case of first impression. There simply is no valid reason to grant review herein. Accordingly, for the foregoing reasons, the Bank submits that the petition should be denied.

Dated: November 22, 1988

Respectfully submitted,

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